In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 980

CALVIN ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted on all four counts of an indictment charging the unlawful sale and possession of wild ducks and wild geese in violation of 16 U.S.C. 703 and 704. Petitioner was sentenced on January 7, 1966, to concurrent terms of ninety days' imprisonment on all counts and was fined $500 on Count 1 (Tr. IV, 5–6).[1] The court of appeals affirmed, one judge dissenting (367 F. 2d 998).

The evidence showed that petitioner, on three different occasions, made sales of wild ducks and geese

[1] "Tr." refers to the transcript of proceedings in the district court, which have been lodged with this Court.

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to one Miller,[2] a criminal investigator for the Department of the Interior, who posed as a salesman for a chemical company (Tr. II, 24, 32, 39–40, 47, 53–54). Petitioner admitted making the sales (Tr. II, 92–94, 97); his sole defense was entrapment.

1. Petitioner's principal contention is that the trial court's instructions (see Pet. App. 23–25) contained prejudicial comments on the evidence. For the most part, the instructions in question merely enumerated the items of evidence which the jury "might take into consideration" (Pet. App. 23, 24) in deciding the question of entrapment. And, as the majority below pointed out, the trial judge "carefully and meticulously instructed the jury that theirs was the duty to determine all questions of fact, and that they were not to take his statements as binding or conclusive but that theirs was the sole right to pass upon the facts as they found them from the evidence" (Pet. App. 20).

Petitioner particularly complains of a portion of the instructions relating to the unlawful-possession charge (Pet. 5–6, 8). The court charged that, at the time of petitioner's sales of wild fowl, federal regulations prohibited the possession at any one time of more than eight ducks or five wild geese (Tr. III, 15). Later in its charge, the court stated (Tr. III, 20):

> Now, members of the jury, I am going to express an opinion to you about the fourth count of this indictment. Whatever your finding may

[2] On the third occasion, petitioner sold 39 ducks and 20 geese (Tr. II, 53). From this transaction arose the fourth charge of possession of an unlawful number of wild fowl.

> be with respect to the guilt or innocence of the defendent under the first three counts of this indictment, that is, the sale of wild ducks and wild geese, this pertains to the charge of possesion. Can you say from this evidence that the law of entrapment, believing and insisting that he did it because he was entrapped, applies to the possession, was he entrapped into providing 31 wild ducks and 15 wild geese, was he entrapped in doing that. That's for you to say, it's not for me to say. *But if you find and believe that he knowingly, willfully and unlawfully did it, he is guilty and if he had them it was unlawful, he had no right to have that many wild ducks and wild geese. Did he know he had them and was it done willfully. Under the law as I have read it to you, he had no right to have those.* [Emphasis supplied.]

Petitioner contends that the italicized portion of this charge was tantamount to a directed verdict of guilty (Pet. 6). It is apparent, however, that, in stating that petitioner had no right to possess that many fowl, the court was merely referring again to the limitations imposed by federal regulation. Petitioner admitted making the sales and, consequently, possessing an unlawful quantity of fowl. Thus, in the quoted instruction, the court was simply focusing the jury's attention on the sole remaining issue as to count IV—*i.e.*, whether petitioner "was * * * entrapped into providing 31 wild ducks and 15 wild geese," or whether he "knowingly, willfully and unlawfully" provided them (Tr. III, 20).

Petitioner's reliance (Pet. 8) on *Bihn* v. *United States*, 328 U.S. 633, is misplaced.[3] In that case, the court's instruction—"Did she steal them? *Who did if she didn't?* You are to decide that"—was found offensive in that it could have been construed by the jury to mean that "it was their 'duty' (a) to decide that appellant committed the theft unless (b) they decided that some other specific person did" (328 U.S. at 637). There is no comparable possibility of confusion stemming from the charge here.

Petitioner also suggests (Pet. 6) that the judge erred in instructing the jury to disregard evidence of sales by petitioner to Miller of pheasants and quail at the time he sold wild ducks and geese (see Tr. II, 38–40, 53). It was entirely proper, however, for the court to point out that pheasants and quail were not covered by federal law and that, consequently, those sales were relevant only as part of the general background of the transactions giving rise to the present indictment.

2. There is no merit in petitioner's contention that the court erred in permitting the government to call a rebuttal witness. The relevant testimony may be briefly summarized:

Miller testified during the government's case-in-chief that on the evening of October 25, 1963, he entered petitioner's tavern in Rulo, Nebraska (Tr. II, 25–26) and told him that he had been recommended to

[3] *Bollenbach* v. *United States*, 326 U.S. 607, also relied on by petitioner, involved a legally erroneous instruction as to the availability of a statutory presumption and is not in point here.

him by some friends as a person from whom he could buy wild ducks and geese. Petitioner remarked that since it was the start of the hunting season, game wardens were plentiful but the ducks and geese had not yet arrived in large numbers. He indicated that he might be able to supply Miller later. After inquiry by Miller, petitioner quoted various prices for different varieties of ducks and geese and told Miller how he could get in touch with him by mail (Tr. II, 29–30).

Petitioner, when he took the stand, admitted meeting Miller on the night in question but denied quoting prices of ducks and geese to him (Tr. II, 96). Petitioner further stated that he had never discussed selling ducks or geese with anyone prior to his initial conversation with Miller (Tr. II, 96–97).

At the conclusion of petitioner's testimony, the government introduced one Drummond, a Missouri conservation agent, as a rebuttal witness. Drummond, who did not then know Miller, went to petitioner's tavern with another agent on the evening of October 25, 1963, about an hour before the first meeting between Miller and petitioner. They expressed to petitioner an interest in buying some wild water fowl and petitioner asked how many they needed. When the agents replied that they wanted twenty-five mallards and five Canada geese, petitioner quoted prices of $2.50 per mallard and $5.00 per Canada goose. He told the agents that the area was full of wardens and that it would be some time before he got any birds (Tr. II, 129–132).

As the trial court[4] and the court of appeals (Pet. App. 20) both found, Drummond's testimony was clearly pertinent to the defense of entrapment. The testimony—which directly contradicted petitioner's statement that he had not, prior to speaking to Miller, discussed the selling of wild ducks or geese with anyone else—plainly was proper rebuttal. Contrary to petitioner's contention, this testimony did not constitute "collateral impeachment"; it was relevant, not only as a contradiction, but also for its bearing on the central issues in the case. See 3 Wigmore, *Evidence* (3d ed., 1940) § 1003.

3. It is evident from Miller's and Drummond's testimony that the evidence did not establish entrapment as a matter of law. The government's evidence showed that petitioner was predisposed to engage in the illegal sale of wild fowl. Miller merely provided him with the opportunity to do so. *United States* v. *Stocker,* 273 F. 2d 754 (C.A. 7), certiorari denied, 362 U.S. 963; see also *Sorrells* v. *United States,* 287 U.S. 435; *Sherman* v. *United States,* 356 U.S. 369; *Masciale* v. *United States,* 356 U.S. 386; *Lopez* v. *United States,* 373 U.S. 427, 434.

4. Petitioner urges that the trial judge committed error in failing to instruct the jury as to the elements of the offenses charged (Pet. 9). As the court of appeals noted, however, the trial judge specifically defined for the jury the meaning of the terms "feloni-

[4] In overruling petitioner's objection to Drummond's testimony, the trial court stated that the evidence was relevant to "the question of entrapment" and petitioner's "willingness * * * to sell ducks" (Tr. II, 134).

ously", "unlawfully", and "willfully" (Pet. App. 15–16) and gave thorough instructions on the law of entrapment (Tr. III, 11–13) and the meaning of "reasonable doubt" (Tr. III, 5–6). In light of petitioner's admission that he had made the sales, there was no need for any further charge.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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